Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KHREATIVITY UNLIMITED, INC., a Corporation, individually and on behalf of the Khreativity/Kidzart joint venture,
Petitioner,

v.

MATTEL, INC.
Respondent.

On Petition for Writ of Certiorari To the Second Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Unanimously, each and every Circuit in this country has held that an enforceable implied-in-fact contract may be inferred from the conduct of the parties, including the Second Circuit, the Southern District of New York and in New York state court. The Second Circuit nonetheless has held in this case, without any supporting citation whatsoever, that despite the written judicial admission by a business entity that:

a) an authorized "finder" performed services for it by:

i) introducing it to a third party with whom the business entity desired to enter into a licensing agreement; and

ii) arranging a meeting whereby negotiations were held between the "finder", the business entity and the third party; and

b) several years later, the business entity and the third party entered into a licensing agreement with each other,

the "finder" has not proved the "requisite elements" of a contract between itself and the business entity for payment to the "finder" of a "finder's fee" for services performed by it. Thus, the first question presented is whether the above admission by the business entity meets the "required elements" necessary to prove the

existence of a "finder's fee" contract between the business entity and the finder, whether under New York or any other state's law.

2. Under New York law, the facts in the previous question are governed by N.Y.G.O.L. §5-701(b)(3)(c), providing that the judicial admission by a business entity of the existence of a "finder's fee" contract between itself and the "finder" creates the existence of an enforceable "finder's fee" contract. However, there has never been a decision by any New York court regarding the meaning of the word "contract" as it appears in N.Y.G.O.L.§5-701(b)(3), a fact that has not been disputed in this case. Further, in this case, petitioner and respondent agree that the plain meaning of the word "contract" should otherwise be derived from the New York Court of Appeals' most recent ruling - contained in **Maas v. Cornell Univ.**, 721 N.E.2d 966, 699 N.Y.S.2d 716 (1999) - regarding the required elements necessary to infer the existence of an enforceable contract under New York law. Petitioner, after filing its Petition for Rehearing and/or Petition for Rehearing En Banc, included this undisputed argument in its motion for Certification of Certain Questions to the New York Court of Appeals Pursuant to Second Circuit Rule §0.27. Although Rule §0.27 provides that the filing of such a motion is allowed in a case "pending" before the Court, the Second Circuit nonetheless denied petitioner's motion without opinion. Thus, the second question presented is whether the Second Circuit should have properly certified the issue of the meaning of the word "contract" under N.Y.G.O.L. §5-701(b)(3) to the New York Court of Appeals.

3. In 1993, the New York Court of Appeals, in **Apfel v. Prudential-Bache**, 81 N.Y.2d, 600 N.Y.S.2d 433, explicitly ruled in favor of "idea-sellers" by stating that when:

a) an "idea-seller" and an "idea-buyer" enter into a contract with each other for payment to the seller by the buyer for disclosure of an idea; and

b) the contract is entered into after, and not before, the seller discloses the idea to the buyer;

the seller does not have to prove any element of "novelty" whatsoever in the idea in order to collect from the buyer for breach of contract for nonpayment, a marked change from the previous requirement of "novelty" under New York law in such a situation. In this case, while the parties were awaiting the District Court's opinion, the Second Circuit handed down its decision in **Nadel v. Play-by-Play Toys & Novelties, Inc.**, 208 F.3d 368 (2d Cir. 2000), ruling that a seller must prove "novelty to the buyer" in the above situation and cited **Apfel**, *supra*, as support for this proposition. Subsequently, in the District Court, Judge Scheindlin ruled that petitioner had failed to prove "novelty" in its ideas submitted to respondent under the ruling in **Nadel**. In the Second Circuit, petitioner argued that the Circuit's decision in **Nadel** grossly misinterpreted the New York Court of Appeals' decision in **Apfel** under the set of facts above. Despite respondent's failure to dispute these arguments at any time during these proceedings, and despite otherwise ruling that the facts showed that petitioner and respondent entered into an oral contract

for a "finder's fee" after petitioner disclosed its ideas to respondent, the Second Circuit nonetheless ruled that petitioner failed to prove "novelty" in its ideas, and cited **Nadel** in support of its ruling. Thus, the third question presented is whether the Second Circuit's ruling in **Nadel** erroneously interpreted the ruling in **Apfel** by eliminating specific rights granted to "idea-sellers" by the New York Court of Appeals.

4. As to the issue contained in question number three (3), petitioner argued that even if **Nadel**, *supra*, is determined to be the controlling decision over **Apfel** regarding the rights of an "idea-seller", petitioner's ideas must be considered "novel to the buyer" under the **Nadel** decision's definition of the concept as applied to contract cases. Nonetheless, the Second Circuit rejected this argument and stated that petitioner's ideas were not generally "novel", a concept the **Nadel** Court explicitly ruled applies to misappropriation, and not contract, causes of action. Thus, the fourth question presented is whether the Second Circuit erroneously ruled that petitioner's ideas were not generally "novel " under the **Nadel** decision.

5. As to the issue contained in question number five (5), petitioner argued that the concept of "novelty" itself was generated from an erroneous New York Appellate Division decision embodied in **Soule v. Bon Ami Co.**, 201 A.D. 794, 195 N.Y.S. 574 (2d Dept. 1922) and should therefore be eliminated or modified. Nonetheless, the Second Circuit rejected this argument without opinion. Thus, the fifth question presented is whether the concept of "novelty" under New York

law should be eliminated or modified because of its origination in an erroneously-interpreted decision.

6. As to the issue contained in the previous three (3) questions, petitioner moved for Certification to the New York Court of Appeals as the proper forum to decide the rights of "idea-sellers" under New York law. Nonetheless, the Second Circuit denied petitioner's motion, without opinion. Thus, the sixth question presented is whether the Second Circuit should have properly certified the issue of the rights of "idea-sellers" under New York law to the New York Court of Appeals.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Khreativity Unlimited, Inc. states that it has no corporate parents, and that no publicly held company owns 10% or more of Khreativity's stock.

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PETITION FOR A WRIT OF CERTIORARI AND PETITION FOR REVERSAL OF THE SECOND CIRCUIT'S DECISION TO REFUSE TO CERTIFY CERTAIN QUESTIONS OF LAW TO THE NEW YORK COURT OF APPEALS

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. Alternatively, petitioner respectfully petitions for a reversal of the Second Circuit's denial, without opinion, of petitioner's motion to certify certain questions to the New York Court of Appeals.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Second Circuit (per Walker, C.J., joined by Pooler and Hall, sitting by designation) denying petitioner's Petition for Rehearing And/Or Petition for Rehearing En Banc is set forth in the Appendix hereto (App. A-31) and is not otherwise published.

The Order of the United States Court of Appeals for the Second Circuit (per Walker, C.J., joined by Pooler and Hall, sitting by designation) denying petitioner's Motion for Certification of Certain Questions to the New York Court of Appeals, is set forth in the Appendix hereto (App. A-30) and is not otherwise published.

The Summary Order of the United States Court of Appeals for the Second Circuit (per Walker, C.J.,

joined by Pooler and Hall, sitting by designation) affirming the District Court's holding is set forth in the Appendix hereto (App. A-24) and is not otherwise published.

The Decision and Order of the District Court for the Southern District of New York (per Scheindlin, D.J.) is set forth in the Appendix hereto (App. A-1) and is published at 101 F.Supp.2d 177.

STATEMENT OF JURISDICTION

The Order of the United States Court of Appeals for the Second Circuit denying petitioner's Petition for Rehearing And/Or Petition for Rehearing En Banc was entered on February 26, 2001. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

New York General Obligations Law §5-701(b)(3)(c):

b. Notwithstanding paragraph one of subdivision a of this section:

3. There is sufficient evidence that a contract has been made if:..

...(c) The party against whom enforcement is sought admits in its pleading, testimony or otherwise in court that a contract was made;

STATEMENT OF THE CASE

In 1993, the Court of Appeals of New York, in **Apfel**, *supra*, made a significant change in long-standing New York law by explicitly ruling that an "idea-seller", in a breach of contract action against an "idea-buyer" for the buyer's use of the idea without payment to seller, does not have to prove any element of "novelty" whatsoever in the idea in order to maintain the action so long as the contract executed was a "post-disclosure" contract whereby the parties executed the contract after disclosure of the idea by the seller to the buyer.

In 1994, the New York Statute of Frauds was amended to include 5-701(b)(3)(c) , providing that in a breach of contract suit whereby the underlying contract must be in writing (i.e. a "finder's fee" agreement), there is sufficient evidence of a "contract" when the party to be charged judicially admits in a pleading, testimony or otherwise that a contract had been entered into between the parties.

Every year, Mattel, Inc. ("Mattel"), a manufacturer and distributor of, *inter alia*, toys and dolls with its principal place of business in California, holds an event in New York called an "inventor sweep" (the "sweep"). At the "sweep", Mattel solicits all kinds of business ideas from inventors, including ideas incorporating intellectual property not owned by the inventor and ideas for improving products already owned, manufactured and distributed by Mattel.

In April 1996, Meridyth Webber ("Webber"), sole shareholder for Khreativity Unlimited, Inc. ("Khreativity") and Ruth Morace ("Morace"), sole shareholder for Kidzart, Inc. attended the "sweep" in order to submit their joint "idea" for a Mattel doll incorporating intellectual property owned the National Basketball Association's ("NBA") subsidiary, NBA Properties, Inc. At the "sweep", Webber and Morace submitted to Jamie Filipeli ("Filipeli"), a Mattel representative, the prototype for what they called the "NBA Commemorative Doll" in the form of a Mattel-owned "Cabbage Patch Kid" doll dressed in an NBA-owned New Jersey Nets team uniform. After showing interest in the idea, Filipeli indicated to Ms. Webber and Ms. Morace that they should contact Gene Garlock ("Garlock"), a Mattel Vice President located in California.

Webber contacted Garlock, who stated to Webber that Mattel would be interested in her and Morace's idea if the NBA and Mattel could reach an agreement regarding Mattel's use of the NBA's intellectual property. After Webber stated that she could arrange a meeting between Mattel and the NBA to discuss such an arrangement, Garlock authorized her to do so and orally promised her a "finder's fee" should an agreement between Mattel and the NBA materialize. Subsequently, Webber arranged a meeting between herself, Morace, Garlock of Mattel and Greg Lassen, the head of Licensing for NBA Properties, Inc. that was held in May 1996 at NBA Headquarters in New York. At this meeting, Webber and Morace submitted additional ideas to Garlock and Lassen for a variety of future joint projects between

Mattel and the NBA, including the idea for Mattel's "Barbie" doll to be dressed in the team uniforms of both the NBA and the newly-formed Women's National Basketball Association ("WNBA"), which was to begin operations the following year. At the end of the meeting, Garlock reiterated his promise to Webber that she would be entitled to a "finder's fee" should Mattel and the NBA enter into a licensing agreement.

A few days later, Webber and Morace received a letter from Garlock stating that their "NBA Commemorative Doll" idea submitted at the "sweep"had been passed on to Jeanne Olson, a senior Mattel executive, who "thought it was an interesting concept, (but that) it is not on strategy with the overall marketing of the brand." The prototype submitted at the "sweep" was returned to Webber and Morace along with the letter.

In January 1998, Mattel entered into a licensing agreement with the NBA which called for the manufacture, sale and distribution of many products, including, *inter alia*, Mattel's "Barbie" doll dressed in the team uniforms of the NBA and the WNBA.

On July 21, 1999, Khreativity brought suit against Mattel in the District of New Jersey, which was transferred, sua sponte, to the Southern District of New York. In the suit, Khreativity alleged breach of express and implied-in-fact contract by Mattel to pay Khreativity a "finder's fee" for services performed in introducing Mattel to the NBA at a Khreativity-arranged meeting that ultimately led to a licensing

agreement between Mattel and the NBA. Khreativity argued that because Mattel had, in its pleadings, judicially admitted that:

1. Webber arranged a meeting held at NBA Headquarters in New York that was attended by Garlock from Mattel, Lassen from the NBA, Webber and Morace, and

2. In January 1998, Mattel and the NBA entered into a Licensing Agreement,

Khreativity could successfully maintain its suit under N.Y.G.O.L. §5-701(b)(3)(c), which provides that there is sufficient evidence that a "finder's fee" contract is made when the party against whom enforcement is sought admits in its pleading that "a contract" was made. In further support of this argument, Khreativity cited the explicit rulings in **Springwell Corp. v. Falcon Drilling Co., Inc.**, 16 F.Supp.2d 300 (S.D.N.Y. 1998) and **Shapiro v. Dictaphone Corporation**, 66 A.D.2d 882, 411 N.Y.S.2d 669 (App Div. 1978) that the admission of performance, and not the admission of a "promise to pay", is adequate to maintain an action for breach of an oral "finder's fee" agreement.

Further, Khreativity alleged that Mattel was unjustly enriched by Khreativity in its capacity as an "idea-seller" by supplying Mattel, in its capacity as an "idea-buyer", with the ideas for Mattel's "Barbie" doll

to be dressed in the team uniforms of the NBA and WNBA[1].

While awaiting the decision from the Southern District, the Second Circuit Court of Appeals handed down its decision in **Nadel**, *supra*, ruling that under New York law, an "idea-seller", in a breach of contract action against an "idea-buyer" for buyer's use of the idea without payment to seller, must prove that the idea is "novel to the buyer" to maintain the action, even if the contract executed was a "post-disclosure" contract whereby the parties executed the contract after disclosure of the idea by the seller to the buyer. The **Nadel** Court cited the New York Court of Appeals' ruling in **Apfel**, *supra*, in support of its decision by stating the following:

> "...**Apfel** made clear that the 'novelty to the buyer' standard is not limited to cases involving an express post-disclosure contract for payment based on an idea's use."

Nadel, *supra*, at 376.

On May 23, 2000, Judge Scheindlin, in her District Court opinion (App. A-1), ruled that because Mattel had not judicially admitted a "promise to pay" Khreativity (in Khreativity's capacity as a "finder"), Mattel had not judicially admitted that "a contract" was made either under N.Y.G.O.L. §5-701(b)(3)(c) or under the rulings in **Springwell** and **Shapiro**, *supra*,

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[1] Khreativity originally argued that California law applied to this issue.

thus barring Khreativity's claim for a "finder's fee". Further, Judge Scheindlin rejected Khreativity's argument that California law applied as to the issue of unjust enrichment and relied on **Nadel** in her ruling that Khreativity (in its capacity as an "idea-seller") had failed to prove that its "idea" for a "cross-marketing venture" between Mattel and the NBA was "novel" under New York law.

On appeal in the Second Circuit, Khreativity accepted Judge Scheindlin's ruling that New York law applied to all issues in the case and argued the following:

1. Judge Scheindlin erroneously ruled that N.Y.G.O.L. §5-701(b)(3)(c) and the rulings in **Springwell** and **Shapiro**, *supra*, stand for the proposition that it is necessary for Mattel to judicially admit a "promise to pay" in order for Khreativity to maintain its suit for payment of a "finder's fee" to it by Mattel;

2. Judge Scheindlin erroneously analyzed Khreativity's "idea" based upon her mislabeling of the idea as a "cross-marketing venture" rather than the true description of Khreativity's specific ideas, communicated at the meeting, as the ideas for Mattel-owned "Barbie" dolls to be dressed in the team uniforms of the NBA and WNBA;

3. It is undisputed that the Second Circuit's decision in **Nadel**, *supra*, erroneously interpreted the New York Court of Appeals' decision in **Apfel**, *supra*, and that because Garlock promised Webber a "finder's

fee" after Webber had disclosed these ideas at the meeting, Khreativity, as per the ruling in **Apfel**, did not have to prove any element of "novelty" whatsoever in the ideas in order to maintain its action for payment for their usage by Mattel (as Garlock's promise for a "finder's fee" made after Khreativity's disclosure of the ideas also operated as a post-disclosure contract for payment to Khreativity for Mattel's usage of the ideas, as such a contract would necessarily and indisputably have been included in any "finder's fee" to be paid to Khreativity);

4. Even if the "novelty to the buyer" standard were to be applied in this case, Khreativity's ideas are clearly "novel" as to Mattel because of the Second Circuit **Nadel** Court's definition of "novelty to the buyer" (itself erroneously taken from the New York Court of Appeals' ruling in **Apfel** clearly stating that no element of novelty need be proven in a case involving the execution of a "post-disclosure" contract after the ideas are disclosed); and

5. The concept of "novelty" in New York law originated from a case, namely **Soule**, *supra*, that erroneously interpreted its predecessor case, thus resulting in over eighty (80) years of an erroneous law.

On December 14, 2000, the Second Circuit rejected Khreativity's argument (App A-24)[2] pertaining to Mattel's judicial admission of its contract with Khreativity by holding, without any supporting citation whatsoever, that under N.Y.G.O.L. §5-701(b)(3)(c), Mattel did not admit:

> "to facts sufficient to demonstrate the requisite elements of a contract. At most, Mattel conceded that the introduction and negotiations had occurred and that, several years later, it had entered a licensing agreement with NBA."

Further, the Court cited **Nadel**, *supra*, in ruling that Khreativity's ideas for Mattel-owned "Barbie" dolls to be dressed in team uniforms of the NBA and WNBA are not "novel" and stated the following:

> "An idea must be novel as to its recipient for the recipient to be unjustly enriched thereby...Since 1972, Mattel has marketed numerous dolls incorporating sports and sports uniforms, including "Cabbage Patch Kid" and

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[2]This Summary Order also contains several grossly erroneous statements by the Second Circuit. First, the Court stated that Mattel and the NBA entered into a Licensing Agreement "several years" after their meeting with Khreativity (App. A-28). However, it is undisputed that Mattel and the NBA entered into their licensing agreement approximately twenty (20) months after the meeting, or less than two (2) years.

Second, the Court stated that "Mattel has never released a doll wearing an NBA uniform" (App. A-26). Once again, it is undisputed that Mattel has released many products under its Licensing Agreement with the NBA, including Mattel's "Barbie" doll dressed in team uniforms of the NBA and WNBA.

> "Barbie" dolls wearing Olympic basketball and Major League Baseball team uniforms. The fact that Mattel had not previously created a doll using specifically NBA uniforms or logos does not make the idea of such a doll novel."

App. , citing Murray v. Nat'l Broad. Co., 844 F.2d 988, 992-93 (2d Cir. 1998), a matter involving a "misappropriation", and not a breach of contract, action.

Finally, the Court did not address Khreativity's undisputed argument regarding the Second Circuit's erroneous misinterpretation in Nadel, *supra*, of the New York Court of Appeals' explicit ruling in Apfel, *supra*, that an "idea-seller" does not have to prove any element of "novelty" whatsoever in an action for breach of contract for nonpayment by buyer to seller after buyer's use of seller's ideas when a "post-disclosure" contract has been executed by the parties, despite the Court otherwise admitting that Mattel had orally promised to pay Khreativity a "finder's fee" after Khreativity disclosed its ideas to Mattel at the meeting.

In its Petition for Rehearing and/or Petition for Rehearing En Banc, Khreativity argued that the Second Circuit's citation-less decision that Mattel's admission of services performed for it by Khreativity did not "demonstrate the requisite elements of a contract" was in conflict with the decision of each and every Circuit in this country, including the Second Circuit, the United States Supreme Court and the United States Court of Claims. Further, Khreativity

argued that if the Court were to find the existence of an enforceable "finder's fee" agreement due to Mattel's admissions, the Court would have to re-examine Khreativity's argument regarding the Second Circuit's misinterpretation in **Nadel** of the New York Court of Appeals' ruling in **Apfel**, *supra*, that an "idea-seller" does not have to prove any element of "novelty" in an action for breach of a "post-disclosure" contract.

One day after filing its Petition for Rehearing and/or Petition for Rehearing En Banc, petitioner filed a Motion for Certification of Certain Questions to the New York Court of Appeals based on the following:

1. The Second Circuit's citation-less ruling that Mattel had not admitted the "requisite elements" necessary to prove the existence of a "contract" under N.Y.G.O.L. §5-701(b)(3)(c);

2. The Second Circuit's refusal to consider Khreativity's argument that its decision in **Nadel**, *supra*, erroneously misinterpreted the New York Court of Appeals' decision in **Apfel**, *supra*; and

3. The Second Circuit's refusal to consider Khreativity's argument that the concept of "novelty" originated from a ruling - **Soule**, *supra* - that erroneously misinterpreted its predecessor case.

In opposition to this motion, Mattel argued that the motion was improper because the Second Circuit had already decided on the underlying merits of the appeal, and that the case was not "pending" before the

Court as per the rules. Further, Mattel argued that the plain meaning of the word "contract" in N.Y.G.O.L. 5-701(b)(3)(c) should be derived from the New York Court of Appeals' most recent decision in **Maas**, *supra*, regarding the "required elements" necessary to infer the existence of an enforceable implied-in-fact contract. Finally, Mattel argued that it should be awarded all costs and fees pertaining to the motion.

Khreativity, in its reply, agreed with Mattel that the plain meaning of the word "contract" in N.Y.G.O.L. 5-701(b)(3)(c) should be derived from **Maas** and argued that **Maas** supports Khreativity's claim that an admission by Mattel of Khreativity's performance is sufficient to prove the existence of a contract. Further, Khreativity argued that the filing of its Petition for Rehearing and/or Petition for Rehearing En Banc operated to continue the proceedings as "pending" before the Court and cited cases whereby the Court stayed its mandate pending resolution of such a petition.

Despite Khreativity's arguments, the Second Circuit, on February 1, 2001, denied Khreativity's motion for Certification, without opinion (App A-30). Further, on February 26, 2001, the Second Circuit denied Petition for Rehearing and/or Petition for Rehearing En Banc, again without opinion (App A-31). Neither ruling, however, awarded to Mattel any costs or fees associated with the petition or motion.

Khreativity has duly filed its petition for writ of certiorari within ninety (90) days of the entry of the

Second Circuit's Order denying Khreativity's Petition for Rehearing and/or Rehearing En Banc.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF EACH AND EVERY CIRCUIT IN THIS COUNTRY, INCLUDING THE UNITED STATES SUPREME COURT AND THE UNITED STATES COURT OF CLAIMS, AS WELL AS WITH THE DECISIONS OF THE NEW YORK COURT OF APPEALS, THE SECOND CIRCUIT AND THE SOUTHERN DISTRICT OF NEW YORK

The law of each and every Circuit in this country, including that of the United States Supreme Court, is the same when dealing with the issue of the "requisite elements" necessary to infer the existence of an enforceable implied-in-fact contract. In **Hercules, Inc. v. United States**, 516 U.S. 417, 423-424, 116 S.Ct. 981, 986, 134 L.Ed.2d 47 (1996), the Court ruled that an enforceable implied-in-fact contract is:

> "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding."

Id., at 986, citing Baltimore & Ohio R. Co. v. United States, 261 U.S. 592, 597, 43 S.Ct. 425, 426-427, 67 L.Ed. 816 (1923). See also City of Cincinnati v. United States, 153 F.3d 1375, 1377 (Fed Cir. 1998) ("an implied-in-fact contract arises when an express offer and acceptance are missing but the parties' conduct indicates mutual assent"); Eskra v. Provident Life and Acc. Ins. Co., 125 F.3d 1406, 1413 (11th Cir. 1997); Black v. Baker Oil Tools, Inc., 107 F.3d 1457, 1461 (10th Cir. 1991); U.S. Ex Rel. Oliver v. Parsons Co., 195 F.3d 457, 462 (9th Cir. 1999); Phillips v. Marist Soc. Of Washington Province, 80 F.3d 274, 276 (8th Cir. 1996); Chicago Litho Plate Graining v. Allstate Can Co., 838 F.2d 927, 930 (7th Cir. 1988); Kingsley Ass. v. Moll Plasticrafters, Inc., 65 F.3d 498, 504 (6th Cir. 1995); Hondo Oil and Gas Co. v. Texas Crude Operator, Inc., 970 F.2d 1433, 1437 (5th Cir. 1992); Kroblin Refrigerated Xpress, Inc. v. Pitterich, 805 F.2d 96, 104 (3d Cir. 1986); Steinke v. Sungard Financial Systems, Inc., 121 F.3d 763, 775 (1st Cir. 1997); Silverman v. United States, 679 F.2d 865, 871 (U.S.Ct. Clms 1982)[3].

In the Second Circuit, the Court in R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 75-76 (1984) ruled that admission of performance is the most significant factor in determining the existence of a contract between parties (see also Michael Coppel

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[3] Although the Fourth (4th) Circuit has not ruled upon this issue, the Districts within the Circuit have ruled unanimously with the rest of the country. See Robinson v. Nussbaum, 11 F.Supp.2d 10, 15 (D.D.C. 1997); Nossen v. Hoy, 750 F.Supp 740, 744 (E.D.Va 1990); Marlen C. Robb & Son Boatyard v. Vessel Bristol, 893 F.Supp 526, 538 (E.D.N.C. 1994); Riggs Nat. Bank of Washington, DC v. Webster, 832 F.Supp 147, 152 (D.Md 1993); Laidlaw Environmental Services (TOC) v. Honeywell, 966 F.Supp 1401, 1409 (D.S.C. 1996).

Promotions Pty. Ltd. v. Bolton, 982 F.Supp 950 (1997), citing **R.G. Group, Inc.** in finding the existence of an enforceable implied-in-fact contract due to an admission of performance).

In **Springwell**, *supra*, the most recent decision in the Southern District of New York regarding the rights of a plaintiff in a breach of an oral "finder's fee" contract, Judge Sotomayor (now sitting in the Second Circuit) ruled that the written admission by the party to be charged of performance by the plaintiff, and not an additional written admission of a promise to pay, was the overriding factor in a determination that plaintiff could maintain his suit. Judge Sotomayor's decision cited **Shapiro**, *supra*, the New York Appellate Division's favorable ruling for an oral "finder's fee" contract plaintiff that provided the following:

> "Assuming that the Statute of Frauds is not satisfied to sustain the contract cause of action, in our opinion the writings herein would sustain the complaint...the writings need not evidence an actual intention to pay. It is sufficient if the evidence demonstrates that services were requested and the parties reasonably expected that such services were not to be performed gratuitously. In this case, it seems obvious...that (defendant) knew that plaintiff never intended to render his services gratuitously."

Shapiro, *supra*, at 672.

In its reply to Khreativity's Motion for Certification, Mattel cited Maas, *supra*, the most recent New York Court of Appeals decision dealing with the "requisite elements" necessary to infer the existence of an enforceable implied-in-fact contract, as the controlling decision for the Second Circuit's analysis regarding the meaning of the word "contract" under N.Y.G.O.L. §5-701(b)(3)(c). In Maas, the New York Court of Appeals ruled the following:

> "A promise...may be inferred wholly or partly from conduct. An implied-in-fact contract would arise from a mutual agreement and an 'intent to promise, when the agreement and promise have simply not been expressed in words'...
>
> (An implied-in-fact contract) still requires such elements as consideration, mutual assent, legal capacity and legal subject matter."

Maas, *supra*, at 719-720.

In response, Khreativity agreed with Mattel that Maas should be the controlling decision and argued that it has met each of the above "requisite elements" in this case to infer the existence of an enforceable implied-in-fact contract.[4] First, under New York law,

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[4] Mattel, despite its claim that Khreativity did not prove the existence of these "requisite elements", provided no additional citation, and made no analysis or argument anywhere within its papers that its judicially admitted implied-in-fact contract with Khreativity is somehow void for lack of consideration, mutual assent legal capacity and/or legal subject matter.

Mattel's judicial admission of Khreativity's performance of services in its capacity as a "finder" is valid consideration, as the Court in **Roth v. Isomed, Inc.**, 746 F.Supp. 316, 319 (S.D.N.Y. 1990) stated:

> "Consideration, which can take the form of either promise or performance, can be either a bargained for gain or advantage to the promisee or a bargained for legal detriment or disadvantage to the promisor."

Id., at 319.

Second, under New York law, Mattel's judicial admission of Kherativity's performance of services in its capacity as a "finder" is considered "mutual assent" . As the **Maas** Court itself explained:

> "A manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance."

Id., at 720, citing Restatement (Second) of Contracts, 18.

Third, under New York law, Mattel has waived any right it may have had to argue that Khreativity somehow lacked "legal capacity" to enter into the implied-in-fact contract. As the Court in **Harrison v. Grobe**, 790 F.Supp. 443 (S.D.N.Y. 1992) stated:

> "A party's competence is presumed and the party asserting incapacity has the burden of proving incompetence. Incapacity must be

> demonstrated at the time of the disputed transaction. The cases demonstrate that under New York law that burden is an extremely heavy one."

Id., at 447, citing Feiden v. Feiden, 151 A.D.2d 889, 542 N.Y.S.2d 860, 862 (3d Dept. 1989).

Fourth, and finally, Khreativity undisputedly argued that the implied-in-fact contract for payment by Mattel to Khreativity for services performed by Khreativity in its capacity as a "finder" does not contain any "illegal subject matter."

Thus, it is abundantly clear that the law of this country provides that a "contract" may be inferred from conduct of the parties, and without any need for an admission of a "promise to pay" by either party. Khreativity argues that the Second Circuit's ruling -- without any supporting citation whatsoever -- that the judicial admission by Mattel of Khreativity's performance of services for Mattel (in Khreativity's capacity as a "finder") does not demonstrate the 'requisite elements' of an enforceable contract under N.Y.G.O.L. §5-701(b)(3)(c) is erroneous and against the law of the Second Circuit, the Southern District of New York and the United States (as well as an ignorance of the widely-known concept of the "implied-in-fact" contract which, by definition, could not involve an express "promise to pay"). Further, Khreativity argues that the Second Circuit, by its own admission, demonstrates that these "requisite elements" have been met by stating the following:

> "At most, Mattel conceded that the introduction and negotiations had occurred and that, several years later, it had entered a licensing agreement with NBA."

(App A-28). Khreativity argues that this very concession is sufficient for Khreativity to successfully maintain a successful breach of "finder's fee" contract action under N.Y.G.O.L. §5-701(b)(3)(c). Any other finding would conflict with the nationwide definition of "contract" as inclusive of "implied-in-fact" contracts inferred by the conduct of the parties.

II. CERTIORARI IS WARRANTED BECAUSE THE SECOND CIRCUIT'S REFUSAL TO CERTIFY THE QUESTIONS OF: A) WHETHER AN ADMISSION OF PERFORMANCE SATISFIES THE DEFINITION OF A "CONTRACT" UNDER N.Y.G.O.L. §5-701(B)(3)(C), DESPITE PETITIONER'S UNDISPUTED ARGUMENTS THAT: 1) NO NEW YORK COURT HAD YET RULED ON THE DEFINITION OF A "CONTRACT" AS CONTAINED IN THIS SECTION OF THE STATUTE, AND 2) THE MOST RECENT NEW YORK COURT OF APPEALS CASE BE UTILIZED IN ADDRESSING THE FACTS NECESSARY TO DEMONSTRATE THE REQUISITE ELEMENTS OF AN IMPLIED-IN-FACT CONTRACT ; B) WHETHER AN "IDEA-SELLER" MUST PROVE ANY

ELEMENT OF NOVELTY IN AN ACTION FOR BREACH OF A POST-DISCLOSURE CONTRACT, DESPITE PETITIONER'S UNDISPUTED ARGUMENT THAT THE DECISION BELOW CONFLICTS WITH THE EXPLICIT DECISION OF THE NEW YORK COURT OF APPEALS REGARDING THE RIGHTS OF "IDEA-SELLERS" UNDER NEW YORK LAW; C) WHETHER PETITIONER'S IDEAS ARE, IN FACT, "NOVEL TO THE BUYER" UNDER THE SECOND CIRCUIT'S MOST RECENT DECISION ADDRESSING THE ISSUE; AND D) WHETHER THE CONCEPT OF "NOVELTY" SHOULD BE MODIFIED OR ELIMINATED AS A RESULT OF ITS ORIGINATION IN A CASE THAT ERRONEOUSLY INTERPRETED ITS PREDECESSOR CASE, IS NOT SUPPORTED BY THE DECISIONAL LAW OF THIS COURT

It is undisputed that no New York court has ruled as to the facts necessary to demonstrate the "requisite elements" of a "contract" under N.Y.G.O.L. §5-701(b)(3)(c). Because of this, Khreativity moved for certification of the question to the New York Court of Appeals.

In its answer to Khreativity's motion papers, Mattel argued that the Second Circuit must look to the New York Court of Appeals' recent holding in Maas,

supra, when ruling on the "requisite elements" necessary to demonstrate the existence of a contract under N.Y.G.O.L. §5-701(b)(3)(c). Khreativity did not dispute this argument, and argued that **Maas** stands for the exact proposition held by Hercules, *supra* – as well as bv each and every circuit in this country – that it is only necessary that Mattel admit performance by Khreativity (and not a "promise to pay") in order for there to exist an enforceable contract between Mattel and Khreativity.

Further, it is undisputed that the Second Circuit's 2000 ruling in **Nadel**, *supra*, erroneously misinterpreted the New York Court of Appeals' 1993 ruling in **Apfel**, *supra*. In **Apfel**, the New York Court of Appeals significantly changed New York law by stating that an "idea-seller" no longer has to prove any element of "novelty" whatsoever in the idea to maintain a successful breach of contract action against an "idea-buyer" for the buyer's usage of the idea so long as buyer and seller entered into a "post-disclosure" contract for payment for use of the idea. In fact, Judge Simons, speaking for the **Apfel** court, clearly stated this proposition when comparing the contract-based action for breach of a "post-disclosure" contract for use of an idea with the property-based claim for an action for "misappropriation" of an idea, as he explains:

> "On the one hand, how can sellers prove that the buyer obtained the idea from them, and nowhere else, and that the buyer's use of it thus constitutes misappropriation of property?...On the other hand, there is no equity in enforcing a

seemingly valid contract when, in fact, it turns out upon disclosure that the buyer already possessed the idea...A showing of novelty, at least novelty as to the buyer, addresses these two concerns. Novelty can then serve to establish both the attributes of ownership necessary for a property-based claim and the value of the consideration – the disclosure – necessary for contract-based claims.

There are no such concerns in a transaction such as the one before us...When a seller's claim arises from a contract to use an idea entered into after the disclosure of the idea, the question is not whether the buyer misappropriated property from the seller, but whether the idea had value to the buyer and thus constitutes valid consideration. In such a case, the buyer knows what he or she is buying and has agreed that the idea has value, and the Court will not ordinarily go behind that determination. The lack of novelty, in and of itself, does not demonstrate a lack of value...To the contrary, the buyer may reap benefits from such a contract in a number of ways – for instance, by not having to expend resources pursuing the idea through other channels or by having a profit-making idea implemented sooner rather than later. The law of contracts would have to be substantially rewritten were we to allow buyers of fully disclosed ideas to disregard their obligation to pay simply because an idea could have been obtained from some other source or in some other way."

Apfel, *supra*, at 478.

In an attempt to "rewrite the law of contracts", the Second Circuit, in **Nadel**, inexplicably ruled, contrary to **Apfel**, that the above language is somehow supportive of a ruling that "novelty to the buyer" [5]is required in a situation involving the execution of a "post-disclosure" contract. Judge Sotomayor, speaking for the Court, erroneously ruled the following:

> "Moreover, **Apfel** made clear that the 'novelty to the buyer' standard is not limited to cases involving an express post-disclosure contract for payment based on an idea's use...
>
> We note, moreover, that the 'novelty to the buyer' standard comports with traditional principles of contract law. While an idea may be unoriginal or non-novel in a general sense, it may have substantial value to a particular buyer who is unaware of it and therefore willing to enter into contract to acquire and exploit it...As the **Apfel** court emphasized, 'the buyer may reap benefits from such a contract in a number of ways – for instance, by not having

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[5] It should be noted that up until the New York Court of Appeals' ruling in **Apfel**, *supra*, the law in this country with respect to the rights of "idea-sellers" has been divided between those juridsdictions following the law of New York as stated in **Murray**, *supra*, and those that follow the law in California, which does not require any an "idea-seller" in a breach of contract action to prove any element of "novelty" whatsoever. See **Whitman v. Lear**, 751 F.2d 90 (2d Cir. 1984).

> to expend resources pursuing the idea through other channels or by having a profit-making idea implemented sooner rather than later."

Nadel, *supra*, at 376-377, citing **Apfel**, *supra*, at 475-76, 478.

As clearly shown above, the exact language utilized in **Apfel** to support the proposition that no element of "novelty" need be proven in a situation involving the execution of a "post-disclosure" contract ("the buyer may reap benefits...sooner rather than later") is now being utilized by the Second Circuit in **Nadel** to support the wholly different proposition that "novelty to the buyer" in the idea must be proven in order for the "idea-seller" to collect under New York law ("the buyer may reap benefits...sooner rather than later"). This argument has been undisputed by Mattel.

Despite this undisputed argument, Khreativity further argued that even if it were determined that the **Nadel** holding is to apply in this case, Khreativity argued that because its ideas for a Mattel-owned "Barbie" doll dressed in the team uniforms of the NBA and WNBA could not have been legally realized by Mattel until Khreativity, in its capacity as a "finder", introduced Mattel to the NBA, the ideas, by definition, are "novel to the buyer". Clearly, in a situation where an "idea-buyer" cannot legally release a product without the permission of a third party (because of the usage by the buyer of the third party's intellectual property within the product), and the "idea-seller" introduces the "idea-buyer" to the third party, a presumption exists that the

erroneous above-cited language from **Nadel** (itself supporting a wholly-different proposition in **Apfel**, *supra*) would necessarily apply to allow the "idea-seller" to collect from the buyer, as its idea would be "novel to the buyer" under **Nadel** because:

> "the buyer may reap benefits from such a contract in a number of ways - for instance, by not having to expend resources pursuing the idea through other channels or by having a profit-making idea implemented sooner rather than later"

Nadel, *supra*, at 376-377, citing **Apfel**, *supra*, at 475-76, 478.

Khreativity also argued that the Second Circuit's ruling -- that Khreativity's specific ideas for the Mattel-owned "Barbie" doll to be dressed in NBA and WNBA team uniforms were not novel because Mattel had previously engaged in business with other sports organizations such as Major League Baseball and the Olympics -- was inappropriate in that the Court's analysis was based on whether the idea was "novel" generally and not, as the **Nadel** ruling (while erroneously interpreting **Apfel**) states, "novel" to Mattel specifically. Finally, Khreativity argued that the Court's citation of **Murray**, *supra*, as support of its holding that Khreativity's ideas were not "novel", was wholly inappropriate, as both **Apfel** and **Nadel** have made clear in their respective rulings that in cases involving a "misappropriation" cause of action (such as **Murray**) and not involving a breach of contract action, (such as this case) the Court's inquiry

should focus on whether the idea at issue is "novel" in the general sense (and not "novel to the buyer").

Finally, Khreativity argued in the Second Circuit that because the concept of "novelty" originated from **Soule**, *supra*, a case heavily cited by the **Nadel** court that erroneously interpreted its predecessor case, a Connecticut Supreme Court of Errors case called **Masline v. New York, N.H. & H.R. Co.**, 95 Conn 702, 112 Atl. 639 (1918), the concept itself should be eliminated or modified from New York law[6].

In **Soule**, *supra*, Judge Jaycox, in his analysis leading up to his ruling that "ideas which are the subject of contract must...be new and original" (**Id.**, at 576), stated the following:

> "A case very similar to this was determined by the Connecticut Supreme Court of Errors (in **Masline**)...In that case...the court held that (the idea) was not new and novel information...In this connection, speaking by Gager, J., it is said:
>
> 'When information is proffered as the consideration for a contract, it is necessarily implied - is, indeed, of the essence of the proffer - that the information shall be new to the one to whom it is proffered. A statement to one of what he already knows is not as to him information, but merely a statement of a fact

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6 Under New York law, in order for an exception to stare decisis to apply, there must be a "compelling reason" to change the established rule. **Dufel v. Green**, 603 N.Y.S.2d 624 (App Div. 1993).

> already known. The imparting of information in a situation like this must involve an active process, resulting in arousing or suggesting ideas or notions not before existent in the mind of the recipient; otherwise, it is not information in the true sense of the term, although it may be a statement of fact.'"

Id., at 576, citing Masline, *supra*, at 640. This represents the entirety of Judge Jaycox's cited text from Judge Gager's opinion in Masline, *supra*.

However, Judge Jaycox failed to cite the rest of Judge Gager's opinion in Masline, in which Judge Gager stated the following:

> "To furnish a consideration for a contract of this kind, the plaintiff must upon his proposition either offer a new idea to be protected by the contract, or, if the idea is common, he must present a specific method of his own for the use and application by the defendant of the common idea."

Masline, *supra*, at 642, citing Stein v. Morris, 120 Va. 390, 91 S.E. 177, and Bristol v. Equitable Life Assurance Society, 5 N.Y.Supp. 131.

Khreativity argued that because Judge Jaycox neglected to rely on this portion of Judge Gager's opinion in his ruling in Soule that "no person can by contract...monopolize an idea that is common and general to the whole world" (Soule, *supra*, at 576), a compelling reason existed to eliminate "novelty" from

New York law, or, alternatively, modify the requirement to protect the "idea-seller" who discloses an otherwise common idea that provides for a "specific method for its own use and application" by the "idea-buyer."

Despite the above arguments, some of which are undisputed, the Second Circuit, without explanation, refused to certify the question to the New York Court of Appeals. By refusing to certify the question, the Second Circuit has relegated Khreativity to suffer through additional delay and expense by applying to this Court to seek the same answer it could have obtained by certification by the Second Circuit. This Court has consistently ruled that the availability of an adequate certification procedure, especially in the context of statutory interpretation, is preferred to relieve a party of delay and expense and helps build "a cooperative judicial federalism." **Belotti v. Baird**, 428 U.S. 132, 150-151 (1976); **Lehman Brothers v. Schein**, 416 U.S. 386, 390-391 (1974). Khreativity argues that the Second Circuit's refusal to certify the question conflicts with the decisions of this court and has served to add to the delay and expense of Khreativity.

CONCLUSION

The Second Circuit has arbitrarily ruled that the word "contract", contained in the 1994 Amendment to the New York Statute of Frauds in N.Y.G.O.L. 5-701(b)(3)(c), does not include the "requisite elements" necessary to infer the existence of an enforceable implied-in-fact contract, despite and contrary to the

unanimous law of this country (including the law of New York and the Second Circuit itself). Because of this ruling, "finders", who by definition create business opportunities for entities to result in higher profits, have been stripped of the rights afforded to each and every other implied-in-fact contract plaintiff who may benefit from a written admission of performance by the party to be charged.

Further, the Second Circuit had an opportunity to correct an undisputed mistake that has negatively affected the livelihood of New York "idea-sellers" and inventors, who, in an action for breach of a "post-disclosure" contract to pay for the idea, must now prove "novelty to the buyer" in the idea, a concept that was clearly eliminated by the New York Court of Appeals in 1993. Despite this opportunity, the Second Circuit chose not to correct its mistake, resulting in granting the legal ability to entities such as Mattel to hold an "Inventor Sweep" whereby they may legally solicit ideas involving intellectual property owned by a third party and then subsequently not have to pay for these ideas once they come to fruition. Khreativity argues that this does not make any sense.

For all the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Second Circuit and, ultimately, to reverse the Orders below and remand the matter to the District Court for trial; or, in the alternative, to reverse the order below and order Certification to the New York Court of Appeals on each and every question presented to protect the rights of "finders" and "idea-sellers" in New York.

Respectfully submitted,
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United States District Court,
S.D. New York.

KHREATIVITY UNLIMITED, a Corporation, individually and on behalf of the
Khreativity/Kidzart joint venture, Plaintiff,
v.
MATTEL, INC., a Delaware corporation, Defendant.

No. 99 CIV. 9321 SAS.

May 23, 2000.

Solicitors of ideas to toy manufacturer brought action to recover finder's fee and for unjust enrichment. On defendant's motion for summary judgment, the District Court, Scheindlin, J., held that: (1) under New York law, defendant's alleged oral agreement to pay finder's fee to plaintiffs was not enforceable, even on quantum meruit basis, absent admission by defendant that agreement existed, and (2) plaintiffs' idea for cross-marketing venture between defendant and National Basketball Association (NBA) was sufficiently unoriginal and lacking in novelty that knowledge of it could be imputed to defendant, thereby precluding plaintiffs' claim, under New York law, for unjust enrichment.

Motion granted.

West Headnotes
[1] **Federal Courts** 146

170Bk146

When case is transferred due to improper venue, transferee court applies whatever law it would have applied had action been properly commenced there. 28 U.S.C.A. § 1406(a).

[2] **Brokers** 🔑43(1)
65k43(1)

[2] **Stipulations** 🔑14(10)
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Stipulations that meeting had taken place between toy manufacturer, sports organization and idea solicitor, and that license agreement between manufacturer and organization had been subsequently signed, did not amount to judicial admission that manufacturer had agreed to pay finder's fee to solicitor, as required to take contract out of New York statute of frauds. N.Y.McKinney's General Obligations Law § 5-701, subd. b, par. 3(c).

[3] **Brokers** 🔑43(1)
65k43(1)

Neither written evidence that meeting had been arranged to discuss toy manufacturer's licensing of sports organization's logo, nor manufacturer's stipulations that meeting had occurred and that license agreement had been signed, established that manufacturer had actually agreed to pay finder's fee, as required for alleged finder's quantum meruit claim to be viable under New York statute of frauds.

N.Y.McKinney's General Obligations Law § 5-701, subd. b, par. 3(c).

[4] **Implied and Constructive Contracts** 🔑3
205Hk3

Under New York choice of law rules, New York law was applicable to toy idea solicitors' unjust enrichment claim against manufacturer; though there was some correspondence with manufacturer in California, virtually all of parties' contacts were in New York.

[5] **Implied and Constructive Contracts** 🔑3
205Hk3

In order to sustain claim for unjust enrichment in New York, plaintiff must demonstrate that: (1) defendants were enriched; (2) such enrichment was at plaintiff's expense; and (3) under circumstances it would be unjust not to compensate plaintiff.

[6] **Implied and Constructive Contracts** 🔑3
205Hk3

Idea solicitor's idea for cross-marketing venture between toy manufacturer and National Basketball Association (NBA) was sufficiently unoriginal and lacking in novelty that knowledge of it could be imputed to manufacturer, thereby precluding solicitor's claim, under New York law, for unjust enrichment.

*178 Barry I. Fredericks, Howard M. Nashel, Joel M. Ellis, Jason R. Mischel, Nashel Kates Nussman Rapone Ellis & Traum, LLP, Hackensack, NJ, for Khreativity Unlimited, Inc.

Robin A. Henry, Anne E. Beaumont, Boies, Schiller & Flexner LLP, Armonk, NY, John B. Quinn, Helen Heekyong Chae, Quinn Emanuel Urquhart Oliver & Hedges LLP, Los Angeles, CA, for Mattel.

OPINION AND ORDER

SCHEINDLIN, District Judge.

Defendant Mattel, Inc. ("Mattel") moves for summary judgment on both claims filed against it by plaintiff Khreativity Unlimited, Inc. ("Khreativity"). In January 1998, Mattel entered into a licensing agreement with the National Basketball Association ("NBA") to produce a variety of NBA- related toys. Khreativity claims that the idea for this licensing agreement came *179 from a series of meetings and phone calls between Khreativity, Mattel and the NBA in April and May 1998. In its Complaint, Khreativity alleges that Mattel breached an express or implied-in-fact contract to pay Khreativity a finder's fee for its concept and that Mattel was unjustly enriched by Khreativity's concept.

Mattel argues that New York law applies to both of plaintiff's claims and that, under New York law, plaintiff cannot prevail. While Khreativity admits that New York law applies to its finder's fee claim, it argues that California law applies to its unjust enrichment claim and that, under the applicable law, both claims should survive summary judgment. For the reasons set forth below, Mattel's motion for summary judgment is granted.

I. FACTS AND PROCEDURAL HISTORY

Khreativity, a New Jersey corporation, maintains its principal place of business in New Jersey; Meridyth Mischel Webber, a New Jersey resident, is the President and sole shareholder of Khreativity. *See* Stipulation of Facts § § 1- 2. Kidzart, Inc. ("Kidzart"), a New York corporation, maintains its principal place of business in Texas and has an office in New York; Ruth Morace is the President and sole shareholder of Kidzart. *See id.* § § 3-4. Mattel, a Delaware corporation, maintains its principal place of business in California. *See id.* § 10.

Four times each year, Mattel holds an Inventor Sweep in New York. *See id.* § 12. During an Inventor Sweep, personnel from Mattel's Outside Resources department hold prescheduled meetings with toy inventors to review potential toy ideas. *See id.* On or about April 23, 1996, Mattel hosted an Inventor Sweep (the "April 1996 Inventor Sweep") that was attended by 35 to 40 inventors. *See id.* § 13.

At the April 1996 Inventor Sweep, Morace and Webber presented an idea that Kidzart entitled the NBA Commemorative Doll to Jamie Filipeli of Mattel's Outside Resources department. *See id.* § 17. [FN1] The prototype NBA Commemorative Doll consisted of a Mattel Cabbage Patch Kid doll (which Morace or Webber purchased from a retail source) dressed in a uniform bearing the logo of the New Jersey Nets, an NBA team. *See id.* Morace also gave Mattel a written description of the NBA Commemorative Doll. *See id.* § 18 & Ex. C (written description). Prior to the meeting

with Filipeli, Morace completed and signed a Mattel Product Disclosure Form, which discloses the name and contact information for an inventor, along with the title and a short description of the inventor's potential toy idea. *See id.* § § 14-16 & Ex. B (Product Disclosure Form). Morace gave the form to Filipeli at their meeting. *See id.* § 16. Following the meeting, Filipeli indicated on the Product Disclosure form her intention to show the NBA Commemorative Doll idea to Gene Garlock, Mattel's Vice President for Entertainment and Licensing. *See id.* § § 20-21.

FN1. On or about April 26, 1996, Kidzart and Khreativity signed a joint venture agreement related to the NBA Commemorative Doll. *See id.* § 5 & Ex. A (joint venture agreement).

Following the April 1996 Inventor Sweep, Webber (in New Jersey) telephoned both Garlock (in California) and Greg Lassen (in New York), an employee of NBA Properties, Inc. ("NBA Properties"), to arrange a meeting in New York. *See id.* § § 22-24. According to plaintiff, Webber spoke with Garlock on more than one occasion and, during one of these conversations, Garlock told Webber that if a deal was made, Khreativity would be entitled to a finder's fee. *See* Complaint § 13; Affidavit of Meridyth Webber ("Webber Aff.") § 4. On May 5, 1996, Webber sent Garlock a letter at the Waldorf-Astoria hotel in New York, confirming their upcoming meeting and notifying Garlock that she had arranged for the attendance of "the senior representative in charge of licensing *180 for the [NBA]." *See id.* § 25 & Ex. D

(May 5, 1996 letter from Webber to Garlock). In her letter, Webber gave as a contact number the telephone number of Kidzart's New York office, which is also Morace's residence. *See id.* § 26.

On or about May 8, 1996, Webber and Morace met with Garlock and Lassen at the offices of NBA Properties in New York ("May 8 meeting"). *See id.* § 27. Plaintiff makes several allegations concerning the substance of the May 8 meeting. *First,* plaintiff alleges that the parties discussed a number of ideas besides the NBA Commemorative Doll. *See* Opp. Mem. at 5. Specifically, plaintiff alleges that they discussed: (1) releasing Mattel's Barbie doll dressed in the uniform of an NBA or WNBA team; (2) using stick-on letters and numbers to personalize uniforms; and (3) designing a more expensive doll utilizing clothing and apparel from the NBA and WNBA. *See id.;* Webber Aff. § 6. *Second,* plaintiff alleges that Garlock reaffirmed his earlier promise that Khreativity would be entitled to a finder's fee. *See* Opp. Mem. at 5; Webber Aff. § 8. *Third,* plaintiff alleges that Garlock told Webber and Morace that their ideas would be submitted for consideration by Jeanne Olson, Mattel's Senior Vice President and General Manager of Large and Small Dolls. *See* Opp. Mem. at 5. *Fourth,* plaintiff alleges that, at the conclusion of the meeting, Garlock invited Lassen to come to California the following week, to further discuss an arrangement between Mattel and the NBA. *See id.* at 5-6.

The following day, Morace and Webber (from New York) wrote Lassen (in New York) to thank him for meeting with them. *See* May 9, 1996 Letter from Morace and Webber to Lassen, Ex. E to the Affidavit of

Robin A. Henry, counsel for Mattel ("Henry Aff."). In their letter, Morace and Webber stated:

We are looking forward to a[n] N.B.A. doll and/or doll fashions as being a successful concept for all parties involved. As I suggested, it would also be wonderful to mark the introduction of the N.B.A. Women's teams with a doll line featuring all of the appropriate official uniforms and logos for each of the new 8 teams.

Id. On May 13, 1996, Garlock (in California) sent a letter to Morace (in New York). *See* Stipulation of Facts § 28 & Ex. E (May 13, 1996 letter from Garlock to Webber). That letter stated:

I have passed your Cabbage Patch NBA prototype on to Jeanne Olson, SVP/General Manager Large and Small Dolls. Although she thought it was an interesting concept, if [sic] is not on strategy with the overall marketing of the brand. Enclosed, please find the sample. Thank you for your submission and your continued interest in working with Mattel.

Id.

On October 2, 1996, Webber sent a letter to Mary Pat Gillin of NBA Properties. *See* October 2, 1996 letter from Webber to Gillin, Ex. F. to Henry Aff. In that letter, Webber informed Gillin that she previously had discussed with Lassen her concept of dolls using NBA logos, "an original idea which Mr. Lassen acknowledged had never been proposed before." *Id.* Webber also described the May 8 meeting, noting that "[a]t this meeting it was again stated that I was the first person to have brought to the NBA the idea of a doll using NBA team logos." *Id.* Lassen responded to this letter on October 25, 1996, informing Webber that he was "shocked by certain of [her] comments" and

denying that he had stated that her idea was original or that she was the first person to have brought the idea to the NBA. *Id.* & Ex. G (October 25, 1996 letter from Lassen to Webber). Lassen also told Webber that, contrary to the suggestion in her letter, the NBA had no obligation to inform her if it went forward with an NBA doll. *See id.*

On or about January 21, 1998, Mattel entered into a Retail Product License Agreement (the "License Agreement") *181 with NBA Properties, which gave Mattel world-wide rights to NBA-themed merchandise across all Mattel toy categories, including Barbie, large dolls, games, radio-control vehicles, Sesame Street, Cabbage Patch Kids, Hot Wheels, Matchbox, plush toys and arts and crafts. *See* Stipulation of Facts § 30. Mattel has never sold or otherwise released a Cabbage Patch Kid doll dressed in an NBA team uniform. *See id.* § 31. In 1998, Mattel released a Cabbage Patch Kid doll dressed in a non-team- specific, non-NBA basketball uniform and holding a basketball. *See id.* § 32.

On July 21, 1999, Khreativity sued Mattel in the United States District Court for the District of New Jersey (the "New Jersey District Court"), alleging breaches of an express or implied-in-fact contract and a quasi-contract. *See* Complaint. The breaches involved both Mattel's alleged promise to pay Khreativity a finder's fee for bringing Mattel and the NBA together and Mattel's alleged unjust enrichment through its use of both Khreativity's idea for an NBA Commemorative Doll and Khreativity's efforts and contacts to arrange an introduction of Mattel and the NBA. *See id.* On August 23, 1999, the New Jersey

District Court transferred the case sua sponte to this Court, pursuant to 28 U.S.C. § § 1404 and 1406(a), stating that it appeared that "the allegations of the Complaint do not support venue in this judicial district." *See* August 23, 1999 Order. Mattel now seeks summary judgment in its favor on both of plaintiff's claims.

II. DISCUSSION

A motion for summary judgment may be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *accord Chertkova v. Connecticut General Life Ins. Co.*, 92 F.3d 81, 86 (2d Cir.1996). The moving party has the burden of identifying the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir.1997). The Second Circuit has offered the following summary of the relevant standard:

> While genuineness runs to whether disputed factual issues can reasonably be resolved in favor of either party, materiality runs to whether the dispute matters, i.e., whether it concerns facts that can affect the outcome under the applicable substantive law. A reasonably disputed, legally essential issue is both genuine and material and must be resolved at trial.

Mitchell v. Washingtonville Central School District, 190 F.3d 1, 5 (2d Cir.1999) (quotation marks and citations omitted). In determining whether summary judgment should be granted, the court must resolve all

ambiguities and draw all reasonable inferences against the moving party. *See* D'Amico v. City of New York, 132 F.3d 145, 148 (2d Cir.1998), *cert. denied*, 524 U.S. 911, 118 S.Ct. 2075, 141 L.Ed.2d 151 (1998).

[1] Because the New Jersey District Court transferred the case pursuant to section 1406(a), both parties agree that this Court must apply the law of the Southern District of New York, not the District of New Jersey, in resolving Mattel's motion. *See* Schaeffer v. Village of Ossining, 58 F.3d 48, 50 (2d Cir.1995) ("Following a section 1406(a) transfer, ... the transferee court should apply whatever law it would have applied had the action been properly commenced there.") (quotation marks and citation omitted). In addition, because this Court is exercising its diversity jurisdiction, both parties agree that this Court must apply New York's choice-of-law rules. *See* Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941) ("The conflict of laws rules to be applied by the federal court in Delaware *182 must conform to those prevailing in Delaware's state courts."). But the agreement ends there. The parties disagree about both the application of New York's choice-of-law rules to plaintiff's claim for unjust enrichment and the application of the relevant substantive law to both of plaintiff's claims.

A. Finder's Fee Claim

The parties agree that New York substantive law applies to plaintiff's claim for a finder's fee. Under New York law, the Statute of Frauds, N.Y. Gen. Oblig. Law § 5-701(a)(10), applies to such claims. *See* Fort Howard Paper Co. v. William D. Witter, Inc., 787 F.2d

784, 789 n. 2 (2d Cir.1986) ("There is no doubt that [NY Gen. Oblig. Law] § 5-701(a)(10) bars oral finder's fee contracts."); *see also* *Millennium Capital Markets LLC v. U.S. National Leasing Corp.*, No. 97 Civ. 8397, 1999 WL 311923, at *3 (S.D.N.Y. May 18, 1999) ("It is well settled in New York that, under [§ 5-7(a)(10)], a party may not state a finder's fee claim based upon an oral agreement.") (quotation marks and citation omitted). Plaintiff admits that its claim for a finder's fee is not supported by any writings, but nevertheless makes two arguments as to why the Statute of Frauds does not bar its claim.

[2] *First,* plaintiff argues that judicial admissions can overcome a Statute of Frauds defense. *See* N.Y. Gen. Oblig. Law § 5-701(b)(3)(c) ("There is sufficient evidence that a contract has been made if ... [t]he party against whom enforcement is sought admits in its pleading, testimony or otherwise in court that a contract was made."); *see also* *Scholastic, Inc. v. Harris,* 80 F.Supp.2d 139, 148 (S.D.N.Y.1999) (citing § 5-701(b)(3)(c)). But this exception to the Statute of Frauds is inapposite, because Mattel has never admitted that it agreed to pay plaintiff a finder's fee. Mattel simply stipulated that: (1) Webber arranged the May 8 meeting; (2) Webber wrote Garlock a letter on May 5, 1996, confirming that meeting; and (3) Mattel entered into the License Agreement with the NBA on January 21, 1998. *See* Stipulation of Facts § § 22-27, 30. Even drawing all reasonable inferences in plaintiff's favor, these stipulations do not amount to an admission that Mattel agreed to pay plaintiff a finder's fee. *See* *American Steel Erectors, Inc. v. Lehrer McGovern Bovis, Inc.*, No. 94 Civ. 6253, 1997 WL 122761, at *5 n. 7 (S.D.N.Y. Mar.18, 1997) ("A judicial admission of the

existence of a contract must be clear and unequivocal to take the contract out of the statute of frauds.").

[3] *Second,* plaintiff argues that Mattel's Statute of Frauds defense cannot defeat its quantum meruit claim for a finder's fee. In *Springwell Corp. v. Falcon Drilling Co.,* 16 F.Supp.2d 300 (S.D.N.Y.1998), Judge Sotomayor thoroughly analyzed the viability of quantum meruit claims for finder's fees under New York's Statute of Frauds:

[C]ourts have, at a minimum, required the writing relied upon to establish clearly the existence of the alleged finder's agreement and its subject matter. While written acknowledgment by the defendant of the plaintiff's performance has been found to be persuasive evidence of an agreement's existence, courts have not uniformly required it. On the other hand, courts have dismissed quantum meruit claims under the Statute of Frauds where the writing relied upon failed to establish that the defendant actually agreed to pay a finder's fee, or where the writings left ambiguity as to whether the agreement's terms covered the transaction upon which a fee was claimed.

Id. at 305-06 (citations omitted). [FN2] Plaintiff relies on Mattel's alleged "admissions" to *183 support its quantum meruit claim but, as explained above, those "admissions" are insufficient.

FN2. On September 23, 1998, Judge Sotomayor granted a motion for reconsideration in *Springwell,* reversing her grant of summary judgment. *See id.* at 311-19. That reversal was based on new documentary evidence of an agreement, however, not on any

change in the analysis of the legal issues. *See* id. at 315-17.

In an effort to draw all reasonable inferences in plaintiff's favor, I have also reviewed the May 5 letter from Webber to Garlock. In that letter, Webber indicated that she had arranged for a NBA representative to be present at the May 8 meeting in order to discuss "the possibilities for future joint projects between Mattel and the N.B.A." Stipulation of Facts, Ex. D. Although the letter does suggest that Webber brought Mattel and the NBA together, it provides no evidence that Mattel agreed to pay Webber a finder's fee for the introduction. Accordingly, Mattel's motion for summary judgment on plaintiff's claim for a finder's fee is granted.

B. Unjust Enrichment Claim

[4] The parties disagree about the applicable substantive law governing Khreativity's unjust enrichment claim. "For contract claims ..., New York uses a 'center of gravity' or 'grouping of contacts' analysis: the jurisdiction with the most contacts to the contract in question has the greater interest in seeing its law apply to the interpretation and enforcement of the contract." *Alonso v. Saudi Arabian Airlines Corp.*, No. 98 Civ. 7781, 1999 WL 244102, at *5 (S.D.N.Y. Apr.23, 1999). Under the "center of gravity" approach, courts may consider a number of factors: (1) the place of contracting; (2) the place of negotiation; (3) the place of performance; (4) the location of the subject matter; and (5) the domicile or place of business of the contracting parties. *See* id.; *see also* *Brink's Ltd. v. South*

African Airways, 93 F.3d 1022, 1030-31 (2d Cir.1996) (listing factors). Khreativity argues that California has the greatest interest in seeing its law applied here; Mattel makes the case for New York.

Even a cursory analysis reveals that New York has more significant contacts with the alleged contract. Two of the factors--the place of negotiation and the place of contracting--clearly weigh in New York's favor. Plaintiff submitted its idea to Mattel in New York, during Mattel's quarterly solicitation of toy ideas. The only other meeting between plaintiff and Mattel also took place in New York. Although plaintiff points to some correspondence between Webber in New York and Garlock in California, virtually all negotiations and contracting (to the degree there was any contracting at all) took place in New York. Two other factors--the place of performance and location of the parties--provide no clear answer. The place of performance is unclear because, while Mattel probably would have produced the dolls in California, NBA Properties is located in New York and the dolls would have been distributed across the country. As for the location of the parties, Kidzart, which participated in the joint venture with Khreativity, is a New York corporation; Mattel has its principal place of business in California. [FN3]

FN3. The final factor--the location of the subject matter of the contract--is not significant in this case, because the alleged contract does not deal with "a specific physical thing ... or afford[ ] protection against a localized risk." Restatement (Second) of Conflict of Laws § 188, cmt. e.

Khreativity relies heavily on *Levin v. The Gap*, No. 97 Civ. 4452, 1998 WL 915897 (S.D.N.Y. Dec.30, 1998), an idea submission case in which Judge Chin ruled that California, not New York, law applied. Khreativity identifies facts in *Levin* that are similar to facts in this case: (1) the plaintiff was a New York resident; (2) the defendant was a Delaware corporation with its principal place of business in California; (3) the rejection letter was sent from California to New York; and (4) the plaintiff alleged, among other things, that the defendant was unjustly enriched by using his idea without compensation. Despite *184 these facial parallels, *Levin* is easily distinguishable from the case at bar, because the plaintiff in *Levin* did not meet with representatives of the defendant in New York, either to submit his idea initially or discuss it further. Rather, he mailed his idea to the defendant in California and then participated in a series of letters and phone calls between New York and California; the physical location and residence of the plaintiff constituted the extent of New York's contacts. Because New York has much more significant contacts in this case--contacts that outweigh California's--New York law applies to Khreativity's unjust enrichment claim.

[5] Khreativity alleges that Mattel was unjustly enriched because it used Khreativity's idea without paying any compensation. *See Boyle v. Stephens, Inc.*, No. 97 Civ. 1351, 1997 WL 760498, at *2 (S.D.N.Y. Aug. 26, 1997) ("[T]o prevent unjust enrichment, a plaintiff may recover on a quasi- contract (an as if contract) for that reasonable value.") (quotation marks and citation omitted); *see also AEB & Associates Design Group, Inc. v.*

Tonka Corp., 853 F.Supp. 724, 731 (S.D.N.Y.1994) ("[A] quasi contract ... is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment.") (quotation marks and citation omitted). In order to sustain a claim for unjust enrichment, plaintiff must demonstrate that: (1) defendants were enriched; (2) such enrichment was at plaintiff's expense; and (3) under the circumstances it would be unjust not to compensate plaintiff. *See R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 60 (2d Cir.1997).

Mattel persuasively argues that it was not unjustly enriched by Khreativity's idea for an NBA Commemorative Doll, because it never produced an NBA Commemorative Doll. The record is clear that Mattel returned the prototype doll to plaintiff and never produced the suggested product. *See* Stipulation of Facts § § 29, 31. But Khreativity's idea is not so limited. Plaintiff alleges that, at the May 8 meeting, Webber "presented a number of cross-marketing ideas for Mattel and the NBA, including the idea for Mattel's 'Barbie' doll to be dressed in specific NBA and [WNBA] team uniforms." Webber Aff. § 6. Although Mattel's papers in support of its motion for summary judgment mainly address the narrow question of whether Mattel was unjustly enriched by the NBA Commemorative Doll idea, plaintiff has always framed its allegations more broadly. *See* Complaint § 28 ("By having used plaintiff and plaintiff's efforts and contacts to arrange an introduction to the N.B.A. that led to a licensing agreement between the defendant and the N.B.A., the defendant Mattel has been unjustly enriched at the expense of the plaintiff."); Opp. Mem. at 13 ("Mattel's position that it 'rejected and never produced the

proposed doll' must fail due to language in its own product disclosure form and its attendance of [sic] a meeting whereby plaintiffs [sic] submitted additional ideas that were subsequently used by defendant."). As a result, it is also necessary to decide whether Mattel was unjustly enriched by plaintiff's presentation of the idea of a cross-marketing venture between Mattel and the NBA. [FN4]

FN4. On the other hand, Khreativity's idea does not include its introduction of Mattel to the NBA. An introduction is not an idea, and the Court already has rejected Khreativity's claim for a finder's fee. *See supra* Part II.A.

"[W]hen one submits an idea to another, no promise to pay for its use may be implied, and no asserted agreement enforced, if the elements of novelty and originality are absent, since the property right in an idea is based upon these two elements." *Downey v. General Foods Corp.*, 31 N.Y.2d 56, 334 N.Y.S.2d 874, 877, 286 N.E.2d 257 (1972). Mattel argues it was not unjustly enriched by the cross-marketing idea because that idea was not novel. The Second Circuit recently clarified the relevant standard for assessing whether Khreativity's idea was novel under New York law:

*185 For contract-based claims in submission-of-idea cases, a showing of novelty to the buyer will supply sufficient consideration to support a contract.... While an idea may be unoriginal or non-novel in a general sense, it may have substantial value to a particular buyer who is unaware of it and therefore willing to enter into contract to acquire and exploit it. "[T]he

buyer may reap benefits from such a contract in a number of ways--for instance, by not having to expend resources pursuing the idea through other channels or by having a profit-making idea implemented sooner rather than later."

Nadel v. Play-by-Play Toys & Novelties, Inc., 208 F.3d 368, 376-77 (2d Cir.2000) (quoting *Apfel v. Prudential-Bache Securities, Inc.*, 81 N.Y.2d 470, 600 N.Y.S.2d 433, 436, 616 N.E.2d 1095(1993)). [FN5] Because Khreativity's claim is contract-based, the next question is whether the cross- marketing idea was novel to Mattel, not novel in absolute terms.

FN5. Both parties submitted supplemental letters to explain how *Nadel* strengthened their arguments for or against summary judgment.

Although the "novel to the buyer" standard "involve[s] a fact-specific inquiry that focuses on the perspective of the particular buyer," the Second Circuit indicated that summary judgment is possible:

[I]n some cases an idea may be so unoriginal or lacking in novelty that its obviousness bespeaks widespread and public knowledge of the idea, and such knowledge is therefore imputed to the buyer.... In such cases, a court may conclude, as a matter of law, that the idea lacks both the originality necessary to support a misappropriation claim and the novelty to the buyer necessary to support a contract claim.

Nadel, 208 F.3d at 378-79 (citations omitted). After *Nadel*, the general novelty cases are no longer controlling for contract-based claims. *See, e.g.*, *Murray v. National Broadcasting Co.*, 844 F.2d 988, 992-94 (2d

Cir.1988) (applying general novelty standard to contract-based claim). Nevertheless, those cases remain relevant to the issue of whether an idea is so lacking in novelty that knowledge of the idea can be imputed to the buyer. *See* Nadel, 208 F.3d at 379 (construing *Oasis Music, Inc. v. 900 USA, Inc.*, 161 Misc.2d 627, 614 N.Y.S.2d 878 (Sup.Ct.N.Y.Co.1994), "to hold that, because plaintiff's ideas had such a high degree of commonality, the ideas were so unoriginal that, as a matter of law, they were non-novel to the buyer.").

[6] After reviewing the evidence submitted by both parties, I conclude that, as a matter of law, Khreativity's idea for a cross-marketing venture between Mattel and the NBA was so unoriginal and lacking in novelty that knowledge of the idea can be imputed to Mattel. Mattel has proffered uncontroverted evidence that, prior to the submission of Khreativity's idea, Mattel dressed its dolls in a variety of generic sports uniforms, including basketball uniforms. *See* Affidavit of Pamela Peretz, Operations Manager in Mattel's Interactive Software Department § 4, Exs. A-L (Mattel product catalogs). Mattel also dressed its dolls in Olympic uniforms and Ice Capades outfits, which demonstrates that Mattel already had the idea of partnering its toys with a sporting event before its meeting with Khreativity. *See id.* at Exs. B, C, I, J, K, L. "[W]here ... an idea consists in essence of nothing more than a variation on a basic theme ... novelty cannot be found to exist." Murray, 844 F.2d at 993. Khreativity's idea was nothing more than a variation on concepts already employed by Mattel--dressing dolls in sports uniforms and, more specifically, dressing dolls in uniforms connected to a

sporting event. In order to support a claim for unjust enrichment:

[T]he idea need not reflect the flash of genius, but it must show [ ] genuine novelty and invention, and not a merely clever or useful adaptation of existing *186 knowledge.... Improvement of standard technique or quality, the judicious use of existing means, or the mixture of known ingredients in somewhat different proportions--all the variations on a basic theme--partake more of the nature of elaboration and renovation than of innovation.

Educational Sales Programs, Inc. v. Dreyfus Corp., 65 Misc.2d 412, 317 N.Y.S.2d 840, 844 (Sup.Ct.N.Y.Co.1970). Khreativity's idea simply lacks the requisite innovation to support its claim.

Examination of two other cases that employed the "novelty to the buyer" standard confirms the appropriateness of summary judgment in this case. In *Nadel,* the plaintiff submitted to the defendant a prototype of a spinning, sound-emitting monkey toy. Four months later, the defendant released a spinning, sound-emitting Tazmanian Devil toy that used the same technology. The Second Circuit ruled that summary judgment was inappropriate because the timing of the toy's release, combined with the defendant's failure to return the plaintiff's prototype prior to that release, gave rise "to the reasonable inference that [the defendant] may have used [the plaintiff's] prototype as a model for the development of [its toy]." *Nadel,* 208 F.3d at 381-82. In this case, by contrast, Mattel entered into the Licensing Agreement with the NBA twenty months after its meeting with Khreativity and, of course, plaintiff's idea for a cross-marketing venture did not involve a prototype.

This case more closely resembles *Oasis Music,* in which the plaintiff disclosed its idea for an interactive telephone game to the defendants, who allegedly incorporated some of plaintiff's programming features into their own interactive telephone game. The court ruled that none of plaintiff's programming features were novel, because they either already existed or were variations on a basic theme. *See* *Oasis Music,* 614 N.Y.S.2d at 882-84. For example, although the plaintiff contended that his game included a feature known as "skip logic" that allegedly improved on the standard "linear logic" format, the court ruled that "skip logic" was a variation on a basic theme and a "mere adaptation or natural progression" of the "linear logic" concept. *Id.* at 883. This case presents a similar situation, because Khreativity's idea for a cross-marketing venture was simply a variation on Mattel's earlier doll-marketing efforts.

Viewed with all reasonable inferences drawn in plaintiff's favor, the facts demonstrate only that Mattel had not approached the NBA about a cross-marketing venture. For example, plaintiff alleges that Lassen, the NBA representative at the May 8 meeting, told Webber "that her cross-marketing ideas were 'original' and that Webber was the 'first person to have brought to the NBA the idea of a doll using NBA team logos.' " Webber Aff. § 7. The reasonable inference from this statement was that Mattel had never approached the NBA with the idea for a cross-marketing venture, not that Mattel had never considered pairing its dolls with sports uniforms. Indeed, as mentioned above, it had previously done so on several occasions. Similarly, plaintiff arranged the May 8 meeting between Mattel

and the NBA, contacting both parties independently. *See* Stipulation of Facts § § 22-24 & Ex. D (May 5, 1996 letter from Webber to Garlock). This raises the reasonable inference that Mattel had no prior relationship with the NBA, but nothing more.

Simply put, the fact that Mattel never asked the NBA to participate in a cross-marketing venture does not mean that the venture was a novel idea. *See* Murray, 844 F.2d at 992 (fact that NBC had never televised a show embodying plaintiff's idea did not mean that plaintiff's idea was novel); *see also* *Brandwynne v. Combe International, Inc.*, 74 F.Supp.2d 364, 376 (S.D.N.Y.1999) ("Even assuming, arguendo, that plaintiffs provided a compilation of elements never before offered to the public, plaintiffs' idea nevertheless lacks novelty because a combination of pre-existing *187 elements is not considered novel."). The record evidence, with all inferences drawn in plaintiff's favor, simply does not overcome the conclusion that plaintiff's idea was so unoriginal and lacking in novelty that knowledge of the idea can be imputed to Mattel. Accordingly, Mattel is entitled to summary judgment on plaintiff's unjust enrichment claim.

III. CONCLUSION

For the foregoing reasons, Mattel's motion for summary judgment is hereby GRANTED. The Clerk of the Court is directed to close this case.

SO ORDERED:

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA2 s 0.23 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Second Circuit.

KHREATIVITY UNLIMITED, INC., Plaintiff-Appellant,
v.
MATTEL, INC., Defendant-Appellee.

No. 00-7801.

Dec. 14, 2000.

Appeal from the United States District Court for the Southern District of New York, Scheindlin, J.

Jason R. Mischel, Esq., Fairfield, NJ, for appellant.

Robin A. Henry, Boies, Schiller & Flexner LLP; Anne E. Beaumont, on the brief, Armonk, NY, for appellee.

Present WALKER, Chief Judge, POOLER, Circuit Judge, and HALL, [FN*] District Judge.

FN* The Honorable Janet C. Hall, of the United States District Court for the District of Connecticut, sitting by designation.

SUMMARY ORDER

**1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is AFFIRMED.

Plaintiff-appellant Khreativity Unlimited, Inc. ("Khreativity") appeals from a May 22, 2000 order of the district court granting summary judgment to defendant-appellee Mattel, Inc. ("Mattel").

Meridyth Mischel Webber is Khreativity's sole shareholder, and Ruth Morace is the sole shareholder of Kidzart, Inc. Khreativity and Kidzart were participants in a joint venture attempting to interest Mattel in a toy idea. In April 1996, Morace and Webber attended an "inventor sweep" held in New York by Mattel to solicit toy ideas from inventors. Morace and Webber attended with a prototype "NBA Commemorative Doll": a Mattel "Cabbage Patch Kid" doll they had purchased and outfitted in a New Jersey Nets uniform. They hoped to interest Mattel in producing a similar line of dolls wearing NBA team apparel. They presented the doll and a written description of the idea to a Mattel representative who indicated an intention to share the idea with Gene Garlock, a Mattel vice- president.

After the "sweep," Webber arranged a meeting between Garlock and a licensing representative of NBA Properties, Inc. ("NBA"), Greg Lassen. On several occasions she spoke with Garlock by phone, and at one point, Garlock allegedly stated that Khreativity would be entitled to a finder's fee if a deal between NBA and Mattel were to materialize. In early May 1996, Webber, Morace, Garlock, and Lassen met in NBA's New York offices. Khreativity alleges that, at the meeting, several toy ideas were discussed, including release of Mattel's "Barbie" doll dressed in NBA or WNBA uniforms; Garlock reiterated his promise regarding a finder's fee; they agreed that Khreativity's idea would be submitted to a Mattel senior vice-president; and Garlock invited Lassen to Mattel's offices in California for further discussions.

Roughly one week later, Garlock sent a letter to Morace and Webber indicating that he had passed their idea and prototype doll along to the senior vice-president who "thought it was an interesting concept, [but that] i[t] is not on strategy with the overall marketing of the brand." Mattel returned their prototype doll along with the letter.

In January 1998, Mattel entered a license agreement with NBA, which gave Mattel international rights to use NBA trademarks in Mattel's various toy categories. Mattel has never released a doll wearing an NBA uniform, as did Khreativity's prototype, but Mattel did release a Cabbage Patch Kid doll wearing a generic basketball uniform.

On July 21, 1999, Khreativity brought suit in the District of New Jersey. Khreativity alleged that Mattel

had breached an express or implied-in-fact contract to pay Khreativity a finder's fee and that Mattel was unjustly enriched by Khreativity's supplying the idea for an NBA Commemorative Doll, introducing Mattel and NBA, and facilitating the negotiation of their subsequent licensing agreement. Based on an apparent lack of venue in New Jersey, the district court transferred the case to the Southern District of New York. On May 22, 2000, the district court there granted Mattel's motion for summary judgment.

**2 The district court held that New York law applied to all of Khreativity's claims. The court then held that New York's Statute of Frauds expressly requires finder's fee contracts to be made in writing and that Mattel had made no admissions before the court that would prevent Mattel from asserting the nonexistence of a contract. The district court characterized Khreativity's unjust enrichment claim as based on Khreativity's supplying Mattel with the idea of a "cross-marketing venture between Mattel and the NBA." *Khreativity Unlimited v. Mattel, Inc.*, 101 F.Supp.2d 177, 184 (S . D.N.Y.2000). The court held that Khreativity was required to show that this idea was "novel" to Mattel and concluded that, as a matter of law, Khreativity could not do so because the idea was simply an insignificant variation on ideas already known to Mattel. Khreativity appealed, and we now affirm.

The district court properly concluded that Khreativity's express and implied- in-fact contract claims based on Mattel's alleged promise of a finder's fee were barred by New York's Statute of Frauds. *See* N.Y. Gen. Oblig. Law § 5- 701(a)(10). The statute

unquestionably applies to ostensible finder's fee agreements. *See* Fort Howard Paper Co. v. William D. Witter, Inc., 787 F.2d 784, 789 n. 2 (2d Cir.1986). Admitting that they lack the writing required by the Statute, Khreativity argues instead that its claim is saved by the Statute's exception for "judicial admissions" by the party to be charged. N.Y. Gen. Oblig. Law § 5-701(b)(3) (stating that "[t]here is sufficient evidence that a contract has been made if: ... (c) [t]he party against whom enforcement is sought admits in its pleading, testimony or otherwise in court that a contract was made"). Khreativity's argument is unavailing because Mattel did not admit "that a contract was made": it admitted neither to having entered a contract nor to facts sufficient to demonstrate the requisite elements of a contract. At most, Mattel conceded that the introduction and negotiations had occurred and that, several years later, it had entered a licensing agreement with NBA.

The district court also properly disposed of Khreativity's claim that Mattel was unjustly enriched by Khreativity's actions, concluding that Khreativity's ideas were not sufficiently "novel" to Mattel as a matter of law. An idea must be novel to itsrecipient for the recipient to be unjustly enriched thereby. *See* Nadel v. Play-by-Play Toys & Novelties, Inc., 208 F.3d 368, 376-77 (2d Cir.2000). Since 1972, Mattel has marketed numerous dolls incorporating sports and sports uniforms, including "Cabbage Patch Kid" and "Barbie" dolls wearing Olympic basketball and Major League Baseball team uniforms. The fact that Mattel had not previously created a doll using specifically NBA uniforms or logos does not make the idea of such a

doll novel. *See* Murray v. Nat'l Broad. Co., 844 F.2d 988, 992-93 (2d Cir.1988).

We find the balance of Khreativity's claims to be without merit.

**3 Accordingly, the judgment of the district court is hereby AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORDER

KHREATIFITY V MATTEL Docket No. 00-7801

Before: Hon. John M. Walker, Jr.
Chief Judge
Hon. Rosemary S. Pooler
Circuit Judges
Hon. Janet C. Hall
District Judge

IT IS HEREBY ORDERED that the motion for certification of certain significant questions by this court to the New York State Court of Appeal be and it hereby is DENIED.

Roseann B. MacKechnie, Clerk
By:
s/_____
Arthur M. Heller
Administrative Attorney

Dated: February 1, 2001

UNITED STATES COURT OF APPEALS
FILED FEB 1 2001
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 1007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of February two thousand one.

KHREATIVITY UNLIMITED, INC., a Corporation, Individually and on behalf of the Khreativity/Kidzart joint venture,
Plaintiff-Appellant,
v. Docket No. 00-7801
MATTEL, INC., a Delaware Corporation,
Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Khreativity Unlimited.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, CLERK

By: s/
Beth J. Meador,
Administrative Attorney

UNITED STATES COURT OF APPEALS
FILED FEB 26 2001
SECOND CIRCUIT